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Injunctive Relief in the State and Federal Courts Against Stranger Pickets Who Induce Contract Breach

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NOTE

Injunctive Relief in the State and Federal Courts Against Stranger Pickets Who Induce Contract Breach

I. Introduction

The use of injunctions to prohibit picketing raises constitutional, jurisdictional, and substantive labor law questions. There are jurisdictional disputes between courts and labor relations boards at both the state and federal level. There is also a question as to the substantive law to be applied in state actions in light of federal constitutional guarantees and the federally espoused policy of establishing a uniform body of labor law. It is particularly unclear whether attempts by unions or individuals who are not bound by collective bargaining agreements to induce a breach of contract by another group of employees through the use of peaceful picketing may be enjoined. A typical situation arises when the employees of one division picket at a second division where an employment contract prohibits any work stoppage including the honoring of a picket line. Those who honor the picket line may be compelled to return to work, but there is no clear remedy against those who induced the contract breach. In discussing the availability of injunctive relief, this note will explore the general right to picket, the proper forum for the controversy, and the substantive law to be applied.

II. Constitutional Protection of Picketing

Because picketing is a form of communication its regulation by states raises federal constitutional questions. The Supreme Court first recognized the first amendment ramifications of picketing in *Senn v. Tile Layers Protective Union*,[1] holding that a state may properly authorize peaceful picketing.[2] Justice Brandeis, writing for

1. 301 U.S. 468 (1937).

2. The case arose from an employer's challenge to a Wisconsin law permitting peaceful picketing for publicity.

the majority, noted in dictum that "[m]embers of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[3] Justice Brandeis' dictum provided the foundation for the Court's decision in *Thornhill v. Alabama*,[4] which held that an Alabama statute forbidding peaceful labor picketing was unconstitutional. The Court viewed a labor dispute as a public issue which may be publicly discussed under the protection of the first amendment.[5] "[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[6] The public streets are natural forums for such discussion.

The Court, although resting its decision on the first amendment right to communicate ideas, recognized that inducing the public to refrain from dealing with target businesses is an inevitable result of picketing.[7] This non-speech effect was not considered substantial enough to deprive pickets of their first amendment rights. The Court held that limitations are only appropriate when there is a "clear danger of substantive evils aris[ing] under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[8] Clear danger has been found in cases of violent picketing threatening the public safety.[9] Thus, under the *Thornhill* doctrine, peaceful picketing inducing action by third parties would be constitutionally protected so long as there is a bona fide intent to communicate a labor grievance to the public.

Consistent with the *Thornhill* doctrine the Supreme Court limited a state's power to restrict peaceful picketing, even when conflicting with some state policy. In *American Federation of Labor v. Swing*[10] the Court held that an Illinois statute prohibiting stranger picketing[11]

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3. *Id.* at 478.
4. 310 U.S. 88 (1940).
5. *Id.* at 102.
6. *Id.*
7. *Id.* at 104.
8. *Id.* at 105.
9. *E.g.*, Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Altemose Constr. Co. v. Building and Constr. Trades Coun., 449 Pa. 194, 296 A.2d 504, *cert. denied*, 411 U.S. 932 (1972); City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees Union, 413 Pa. 420, 197 A.2d 614 (1964).
10. 312 U.S. 321 (1941).
11. This type of picketing occurs when the pickets have no employment

was unconstitutional. The Court stated that pickets may engage in free speech beyond their employment setting.[12] The speech aspect of the picketing was emphasized and considered worth protecting despite the coercive intent of the pickets. Two later cases refined the Court's position by holding that a state may not limit peaceful picketing to labor disputes as defined by the state law.[13] Both holdings indicated, however, that picketing must be a bona fide effort to communicate to merit constitutional protection.[14]

The broad license granted to pickets under the *Thornhill* doctrine was soon limited by the Supreme Court, based on a policy of federal deference to state regulation of the non-speech aspects of picketing. The first limitation arose in 1949 in *Giboney v. Empire Storage Co.*,[15] wherein the Court upheld the use of Missouri's antitrust law to enjoin pickets whose avowed purpose was to coerce the plaintiff to cease dealing with non-union sellers.[16] The Court held that the union's free speech rights did not excuse the willful violation of a valid state law. Deference to state policy was continued by the Court in a series of decisions which upheld, in the face of constitutional challenges, state power to limit the geographic area of picketing,[17] protect employers from compulsion to recognize a union not chosen by the employees,[18] prevent a union-coerced ra-

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relationship with the employer picketed. CCH GUIDEBOOK TO LABOR RELATIONS (1973) § 1103.2 at 243.

The protection of stranger picketing was upheld recently in Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

12. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.

AFL v. Swing, 312 U.S. 321, 325-26 (1941).

13. Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293 (1943); Baking Drivers Local 802 v. Wohl, 315 U.S. 769 (1942).

14. In his concurring opinion in Bakery Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942), Justice Douglas indicated that picketing would be federally protected even if it had a coercive effect since that is the necessary and intended effect of picketing.

15. 336 U.S. 490 (1949).

16. The picketing was effective to the extent of reducing the business of Empire Storage, the target company, by 85%. *Id.* at 493.

17. Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942). The Court upheld the Texas court's injunction of picketing at a building site other than that at which the labor dispute arose. The Court held, "recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." *Id.* at 727.

18. Building Service Union Local 262 v. Gazzam, 339 U.S. 532 (1950). The picketing was in violation of Washington's labor act, which prohibited employer coercion of employee representation. Wash. Labor Disputes Act, Rem. Rev. Stat. § 7612 (Supp. 1940). The Court held, *id.* at 541, that violation of a valid state policy was sufficient basis for an injunction and that pickets need not be in violation of a

cial quota system in hiring,[19] protect the interests of sole proprietors,[20] and prevent violation of a state right to work statute by lay-offs of non-union labor.[21] In each case the Court upheld the state's powers to enforce legislatively and judicially enunciated policies[22] without examining the merits of the policies.[23]

Although states are still controlled by *Thornhill* in that they may not prohibit picketing generally, they may enforce policies against specific forms of picketing. In his dissent in *Teamsters Local 695 v. Vogt, Inc.*,[24] Justice Douglas categorized the state policy cases as a retreat from the Court's first amendment position in *Thornhill*.[25] Other commentators maintain that the *Thornhill* doctrine is still in force when picketing is primarily to communicate a labor dispute, but that restraints are permitted when picketing is intended to coerce some secondary activity.[26] This distinction is difficult, since all

criminal statute as they had been in Giboney v. Empire Storage Co., 336 U.S. 490 (1949). The Court emphasized that picketing may be regulated since it is more than pure speech.

> [S]ince picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.

Id. at 537. A similar situation arose in Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957). The Court upheld an injunction against coercing an employer to interfere with his employees' right to select union representation. This was an unfair labor practice under Wisconsin law. WIS. STAT. § 111.06(2)(b) (1974).

19. Hughes v. Superior Ct., 339 U.S. 460 (1950). The state policy against racial discrimination was set forth in case law rather than the state's labor statutes.

20. Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950). The Court discussed the balancing of first amendment rights and the power of the state to enforce its policies.

> [W]e cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with the rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution.

Id. at 478-79.

21. Plumbers Local 10 v. Graham, 345 U.S. 192 (1953).

22. Hughes v. Superior Ct., 339 U.S. 460, 466 (1950); Teamsters Local 309 v. Hanke, 339 U.S. 470, 479 (1950).

23. The Court looks only for unwarranted encroachment on fourteenth amendment rights. Absent such an encroachment, it is sufficient that the state deems the prohibited activity to be evil. *E.g.*, Hughes v. Superior Ct., 339 U.S. 460, 469 (1950); Teamsters Local 309 v. Hanke, 339 U.S. 470, 478 (1950); Building Service Union Local 262 v. Gazzam, 339 U.S. 532, 539 (1950).

24. 354 U.S. 284, 296-97 (1957).

25. "State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing." *Id.* at 297.

26. Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 595-602 (1951).

> Where the elements of speech are entwined with the use of the union's

picketing is coercive to some extent.[27]

The Supreme Court's position was summarized in the 1968 decision of *Food Employees Local 590 v. Logan Valley*.[28]

> To be sure, this Court has noted that picketing involves elements of both speech and conduct, *i.e.*, patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. [citations omitted] Nevertheless, no case decided by this Court can be found to support the proposition that the non-speech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.[29]

The Supreme Court has developed a policy under which picketing may be enjoined if engaged in for an unlawful purpose or in an unlawful manner as defined by state laws and decisions. State courts may enjoin unlawful picketing so long as state standards do not unduly chill first amendment rights. Picketing to induce the breach of a valid collective bargaining agreement has been labelled as unlawful by state courts,[30] and thus satisfies constitutional prerequisites for enjoinment. There remain other obstacles to enjoining stranger picketing, however.

III. Inducing Breaches of Collective Bargaining Agreements

Both federal and state courts have jurisdiction to enjoin breaches of labor contracts. Federal courts are generally limited, however, by

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> economic power, the speech loses its immunity from regulation and the union's whole course of conduct becomes subject to the power of the state 'to set the limits of permissible context open to industrial combatants.'

Id. at 596.

The distinction between publicity and signal picketing was drawn by Justice Traynor in his dissenting opinion in Hughes v. Superior Ct., 32 Cal. 2d 850, 870, 198 P.2d 885, 896-97 (1948).

27. This view was espoused in Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191, 207 (1950):

> The signal category implies a pre-arranged response on the part of other unionists, whereas the publicity category leaves the response merely to chance. Therefore, because signal picketing is intelligently effective, it does not qualify as constitutionally protected communication, whereas publicity picketing is entitled to protection because its effect is speculative.

Similarly, in Comment, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 202 (1942):

> But ultimately the practice of picketing, whatever the motive in the given case or the circumstances under which it is engaged in, is generally a labor activity carried on in furtherance of a plan to impede the picketed person's opportunity to enjoy a free and open market. This differs greatly from the classical notion of free speech which places an abiding faith in the ability of the people to decide wisely between alternative suggestions after discussion and debate.

28. 391 U.S. 308 (1968).

29. *Id.* at 313-314 (Marshall, J.).

30. *See* note 35 *infra*.

the anti-injunction mandate of the Norris-La Guardia Act.[31] An exception to the prohibition was established in *Boys Markets, Inc. v. Retail Clerks Union Local 770.*,[32] in which the Supreme Court held that federal courts, under section 301 of the Labor-Management Relations Act,[33] may enjoin work stoppages that violate a collective bargaining agreement containing a mandatory arbitration clause if the dispute arises from an arbitrable grievance. State courts are not bound by the anti-injunction clause of the Norris-La Guardia Act and may enjoin contract breaches consistent with their own labor policies.[34]

The powers of federal and state courts are not as clear, however, when pickets attempt to induce a contract breach by others. Such activity typically occurs when employees picket a job site where they are not employed to encourage those there employed to breach their no-strike contract clause and thereby bring pressure upon the employer.[35] This inducement to breach a contract does not come within the permissible scope of the federal courts' injunctive powers under *Boys Markets.*[36] States not having anti-injunction acts paralleling the

31. 29 U.S.C. § 101 (1973).

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

32. 398 U.S. 235 (1970).

33. The Court's holding was a narrow one. An injunction may be issued under this holding only when: (1) the collective bargaining agreement contains a mandatory arbitration procedure; (2) the court finds that the strike is over an arbitrable grievance; and (3) the court orders the employer to arbitrate as a condition to obtaining the injunction. Ordinary equitable principles permitting an injunction must also be met. 398 U.S. at 254.

34. *E.g.*, McCarroll v. Los Angeles Co. Dist. Coun. of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Radio Corp. of Amer. v. Local 780, ISTSE, 160 So. 2d 150 (Fla. App. 1964), *cert. denied*, 380 U.S. 985 (1965); Dugdale Constr. Co. v. Plasterers Local 538, 257 Iowa 997, 135 N.W.2d 656 (1965); Rust Eng'r Co. v. Carpenters Local 403, 215 Va. 353, 210 So. 2d 154 (1968); Masonite Corp. v. International Woodworkers, 215 So. 2d 691 (Miss.), *cert. denied*, 394 U.S. 974 (1968); C.D. Perry & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1965); Shaw Elec. Co. v. IBEW Local 98, 418 Pa. 1, 208 A.2d 769 (1965).

35. *E.g.*, Local Union No. 118 v. Utility Workers Union, 81 Ohio L. Abs. 385, 162 N.E.2d 524 (Ct. App. Mahoning 1958); Standard Oil Co. v. Oil Chem. & Atomic Workers Int'l Union, 76 Ohio L. Abs. 266, 144 N.E.2d 517 (C.P. Cuyahoga 1957); Gulf Ref. Co. v. Oil Workers Int'l Union, 51 Ohio Op. 133, 68 Ohio L. Abs. 225, 114 N.E.2d 534 (C.P. Lucas 1953); M & M Wood Working Co. v. United Bhd. of Carpenters, 26 CCH Lab. Cas. ¶ 68,787 (Multnomah, Ore. 1954); DeLuxe Game Corp. v. USW, 77 Pa. D. & C. 221 (C.P. Luzerne 1951); South Atl. & Gulf Coast Dist. of Longshoremen v. Producers Grain Corp., 437 S.W.2d 33 (Tex. Civ. App. 1969).

36. Enjoining those refusing to cross a picket line will have the same ultimate

Norris-La Guardia Act[37] have enjoined the inducement of labor agreement breaches, usually on the basis of equity's jurisdiction to uphold and enforce valid contracts.[38] Picketing to induce the breach of a valid collective bargaining agreement has been regarded as picketing for an unlawful purpose that may be enjoined by state courts.[39] State courts may enjoin unlawful activity as long as the restrictions do not interfere with the guarantees of the United States Constitution.[40]

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effect where the only goal of the pickets is the inducement of the breach. This reasoning was part of the basis of the dissent in *Ex parte* George, 163 Tex. 103, 358 S.W.2d 590, 606 (1962). The dissenter's primary rationale and one which was later upheld by the Supreme Court, 371 U.S. 72 (1962), was that the state court had no jurisdiction to issue the injunction since the dispute was arguably within the realm of the NLRB. *See* notes 41-50 and accompanying text *infra.*

There is some disagreement as to the power to enjoin sympathy strikers whose contract does not expressly cover the situation. *Boys Markets* required that a work stoppage must be "over" an arbitrable grievance. 398 U.S. at 254 (1970). The Circuit Courts are split on the issue. Three circuits hold strictly that the work stoppage must be over an arbitrable grievance: Buffalo Forge Co. v. USW, 517 F.2d 1207 (2d Cir. 1975); Inland Steel Co. v. Local 1545, UMW, 505 F.2d 293 (7th Cir. 1974); Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972). Three other circuits have permitted injunctions against sympathy strikers under a more liberal interpretation of *Boys Markets*: Valmac Industries, Inc. v. Food Handlers Local 425, 519 F.2d 263 (8th Cir. 1975); NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321 (3d Cir.), *cert. denied,* 419 U.S. 1049 (1974); Monongahela Power Co. v. IBEW Local 2332, 484 F.2d 1209 (4th Cir. 1973). These cases are discussed in Comment, *Boys Markets Injunctions in Sympathy Strike Situations,* 6 LOYOLA L.J. 644 (1975).

37. Twenty-five states have anti-injunction statutes which parallel the Norris-La Guardia Act. Ten of these states have made exceptions allowing injunctive relief against strikes in breach of no-strike clauses. COLO. REV. STAT. ANN. § 80-4-6(2)(c) (1963); KAN. STAT. ANN. § 44-809(15) (1964); Louisiana (by judicial decision), Douglas Publ. Serv. Corp. v. Gaspard, 225 La. 972, 74 So. 2d 192 (1954); MINN. STAT. ANN. § 179.11(1) (1961); Montana (by judicial decision), State v. District Court, 61 L.R.R.M. 2159 (1965); New York (by judicial decision), C.D. Perry & Sons, Inc. v. Robilatto, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965); Oregon (by judicial decision), Weisfield, Inc. v. Haeckel, 28 L.R.R.M. 2055 (Ore. Cir. Ct. 1951); PA. STAT. ANN. tit. 43, § 206(d) (1963); Washington (by judicial decision), Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P.2d 397 (1936); WIS. STAT. ANN. § 111.06(2)(c) (1959). *See* note 86 *infra* for the states which prohibit injunctions to end strikes in breach of no-strike clauses.

In American Brake Shoe Co. v. Machinists Dist. Lodge 9, 373 Pa. 164, 94 A.2d 884 (1953) the Pennsylvania Supreme Court held that it had jurisdiction rather than the NLRB because interstate commerce was not involved and because the picketing was not an unfair labor practice under the NLRA. The court affirmed dissolution of the injunction, however, through application of the Pennsylvania Anti-Injunction Act, PA. STAT. ANN. tit. 43, § 206d (1939) since there was no contract in effect between the pickets and the employer.

38. *E.g.,* Mixing Equip. Co. v. Philadelphia Gear Co., 312 F. Supp. 1269 (E.D. Pa. 1970); Campbell Soup Co. v. Diehm, 111 F. Supp. 211 (E.D. Pa. 1952); Bausch & Lomb Opt. Co. v. Wahlgren, 1 F. Supp. 799 (N.D. Ill. 1932); Pennington v. Birmingham Baseball Club, Inc., 277 Ala. 336, 170 So. 2d 410 (1964); American League Baseball Club v. Pasquel, 187 Misc. 230, 63 N.Y.S.2d 537 (Sup. Ct. 1946); Upholsterers' Int'l Union v. United Furniture Workers of Amer., 356 Pa. 469, 52 A.2d 217 (1947). These decisions discuss the general equity power to enjoin the inducement of a breach of a valid contract.

39. *See* note 35 *supra.*

40. *See* notes 1-14 and accompanying text *supra.*

In addition to the constitutional restraints on state power, a jurisdictional hurdle must be crossed before a state court may enjoin the inducement of a contract breach. State court jurisdiction is preempted by the National Labor Relations Board when the challenged activity falls within the protections or prohibitions of the National Labor Relations Act.[41] Jurisdictional preemption has resulted in the vacating of state injunctions against pickets inducing the breach of a collective bargaining agreement.[42] Many state courts, however, regard the issue as within their jurisdiction because the activity is not specifically covered by the NLRA.[43] The Pennsylvania Supreme Court held that its jurisdiction was not preempted by the N.L.R.B. or the Pennsylvania Labor Relations Board in a suit to enjoin coercive stranger picketing on the ground that there was no "labor dispute" between the pickets and the employer.[44]

The enjoinability of picketing inducing a contract breach has been considered only once by the United States Supreme Court. *Ex Parte George*[45] involved an injunction prohibiting the picketing of a subsidiary of an employer with whom the picketing union had a labor dispute.[46] The picketing was aimed at inducing a breach of contract by the employees of the subsidiary. The Texas Supreme Court declared that the matter was of purely peripheral concern to the

41. 29 U.S.C. §§ 151-168 (1973). There is no preemption where the pickets are supervisors and therefore do not qualify as employees under the NLRA Hanna Mining Co. v. Marine Eng'rs, 382 U.S. 181 (1965).

42. *E.g.*, Genesco, Inc. v. Shoe Workers Jt. Coun. 13, 230 F. Supp. 923 (S.D.N.Y. 1964), *aff'd*, 341 F.2d 482 (2d Cir. 1965) (the dispute was held to be arguably within the NLRB's jurisdiction as part of the right to strike guaranteed by § 7 of the NLRA); Teamsters Local 783 v. National Linen Serv. 63, 472 S.W.2d 671 (Ky. 1971) (jurisdiction held to be preempted by the NLRB).

43. *E.g.*, Cooperative Ref. Ass'n v. Williams, 185 Kan. 410, 345 P.2d 709 (1959), *cert. denied*, 362 U.S. 920 (1960). The court held that the coercive picketing was neither protected by section 7 nor prohibited by section 8(b)(4) of the NLRA and, therefore, that state jurisdiction was not preempted. Similarly, in Standard Oil Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 Ohio L. Abs. 266, 275, 144 N.E.2d 517, 525-26 (C.P. Cuyahoga 1957) the court held:

> So it seems to me that there is clearly nothing in the Taft-Hartley Act which can be regarded as protecting concerted activities which have as their purpose possible and probable inducement of breach of contract. This conduct here, neither being prohibited by the Taft-Hartley Act nor protected by the Taft-Hartley Act, therefore, does not fall within any of the categories in which the Supreme Court has said a State Court may not act.

44. Bonwit Teller & Co. of Phila. v. District 65, Retail, Wholesale & Dep't Store Union, 393 Pa. 324, 142 A.2d 193 (1958). A "labor dispute" is required for jurisdiction under both the LMRA and the Pennsylvania Anti-Injunction Act, PA. STAT. ANN. tit. 43, § 206(a).

45. 371 U.S. 72 (1962).

46. 163 Tex. 103, 358 S.W.2d 590 (1962).

NLRB[47] and upheld the injunction because the picketing violated Texas law.[48] The United States Supreme Court vacated the Texas judgment holding that the picketing was at least arguably protected by the NLRA and that arguable jurisdiction was sufficient to preempt Texas jurisdiction.[49] The "arguable preemption" standard is difficult to overcome and would appear to divest state courts of jurisdiction in cases involving inducement of contract breach.[50]

The arguable preemption standard has not been extended to cases wherein the breach of contract rather than the inducement is enjoined. In *William E. Arnold Co. v. Carpenters District Council*[51] the United States Supreme Court held that state or federal jurisdiction may be invoked under section 301 of the LMRA[52] to enjoin a breach of a collective bargaining contract, even when the breach also is arguably an unfair labor practice under the NLRA.[53] The decision departed from the doctrine of arguable preemption that had left cases involving unfair labor practices for the NLRB to decide.[54] The Court reasoned that its decision effectuated the congressional purpose of section 301 that state and federal court actions should be the primary means for promoting collective bargaining.[55]

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47. "We find nothing in the [National Labor Relations] Act which can be regarded as protecting concerted activities which have as their purpose possible and probable inducement of breach of contract." *Id.* at 118, 358 S.W.2d at 600.

48. Inducement of a breach of a labor contract was unlawful under TEX. REV. CIV. STATS. ANN., art. 5154(d), § 4 (1971).

49. The Court relied on San Diego Bldg. Trades Coun. v. Garman, 359 U.S. 236 (1958) for the principle that arguable jurisdiction with the NLRB is sufficient to preempt state court jurisdiction.

The Court indicated that the conduct would most likely fall within the protections of section 7 of the NLRA, "[e]ven assuming, without deciding, that the picketing would not fall within the prohibitions of section 8(b)(4)(A) or section 8(b)(4)(i)(B)." *Ex parte* George, 371 U.S. 72, 73 (1962).

In Milwaukee Plywood Co. v. NLRB, 285 F.2d 325 (7th Cir. 1960) the court held that picketing aimed at inducing a breach of a collective bargaining agreement does not constitute secondary activity prohibited by section 8(b)(4)(A).

50. Preemption by the NLRB is also subject to the requirement that the dispute involve interstate commerce. The Pennsylvania Supreme Court retained jurisdiction because of a failure to meet the interstate commerce requirement in American Brake Shoe Co. v. Machinists Dist. Lodge 9, 373 Pa. 164, 94 A.2d 884 (1953).

51. 417 U.S. 12 (1974).

52. 29 U.S.C. § 185 (1973).

53. 29 U.S.C. §§ 151-168 (1973). The *Arnold* decision was followed in Beriault v. Local 40, Super Cargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union, 501 F.2d 258 (9th Cir. 1974).

54. The leading decision recognizing N.L.R.B. preemption was San Diego Bldg. Trades Coun. v. Garmon, 359 U.S. 236, 245 (1958) in which the court held, "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Accord*, Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953).

55. 417 U.S. 12, 18 (1974) *quoting* Textile Workers v. Lincoln Mills, 353 U.S.

"The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses."[56] The Court referred to its decision in *Smith v. Evening News Association*[57] in which it held that jurisdiction of state and federal courts was not preempted by the NLRB for damage claims arising under section 301. Further excepting breaches of collective bargaining agreements from exclusive NLRB jurisdiction, the Court expressly recognized a number of state and federal decisions granting injunctive relief.[58]

Arnold probably will not be extended to the inducement of contract breaches and the NLRB will continue to preempt state court jurisdiction under *Ex Parte George*. The Court's object in *Arnold* was to promote arbitration as a vital element of federal labor policy by leaving contract disputes to the usual processes of law when the parties have agreed upon a dispute settlement mechanism.[59] This reasoning applies most particularly when injunctive relief is sought.[60] State court jurisdiction to enjoin picketing designed to induce contract breaches would not further this federal labor policy, because when pickets have no contract with an employer, no independent dispute settlement mechanism exists for courts to promote. The contract which is breached is irrelevant to the pickets' grievance and adherence to the terms of that contract by the employer will not settle the

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448, 453 (1957). The *Lincoln Mills* decision held that the policy of section 301 was to foster arbitration of labor disputes.

56. 417 U.S. at 18.

57. 371 U.S. 195 (1962). The court held, "To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do." *Id.* at 200.

58. *E.g.*, Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962); McCarroll v. Los Angeles Co. Dist. Coun. of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Dugdale Constr. Co. v. Plasterers Local 538, 257 Iowa 997, 135 N.W.2d 656 (1965); C.D. Perry & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1965); Upholsterers' Union v. United Furniture Workers, 356 Pa. 469, 52 A.2d 217 (1947).

"[N]othing in the opinions in those cases remotely suggests that state court jurisdiction should turn upon the particular type of relief sought." 417 U.S. at 18.

59. 417 U.S. at 16. This congressional intent to uphold the integrity of collective bargaining agreements was recognized in Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 513 (1962). The Court there reasoned that Congress had designed section 301 of the LMRA to leave such contract disputes "to the usual processes of the law." The promotion of collective bargaining was held to be a vital element of federal labor law policy in Textile Workers v. Lincoln Mills, 353 U.S. 448, 453 (1957).

60. 417 U.S. at 19.

dispute.[61] Since *Arnold*'s reasoning is inappropriate, arguable jurisdiction over disputes concerning inducement of breach of collective bargaining agreements should lie with the NLRB. Even if jurisdiction is retained by state courts, recent Supreme Court decisions make it unclear whether injunctive relief may issue.

IV. State and Federal Court Jurisdiction

Both state and federal courts have jurisdiction in actions brought under section 301 of the LMRA. In *Charles Dowd Box Co. v. Courtney*[62] the Supreme Court held that federal jurisdiction under section 301 is permissive rather than exclusive. The Court reasoned that section 301 was intended to leave enforcement of collective bargaining agreements to the usual processes of law rather than to the NLRB.[63] If the action is brought in state court, federal substantive law must be applied under *Teamsters Local 174 v. Lucas Flour co.*[64] The federal law to be applied is that law which "the courts must fashion from the policy of our national labor laws."[65]

The Court has never clarified whether the availability of injunctive relief is a matter of substantive or procedural law.[66] If the power to enjoin is procedural, state courts may grant or refuse relief according to state labor law,[67] subject only to jurisdictional requirements and the guarantees of the federal constitution.[68] If the power to enjoin is substantive, federal law must be applied even though there

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61. This reasoning led the Second Circuit Court of Appeals to deny a request for injunction against sympathy strikers in Buffalo Forge Co. v. USW, 517 F.2d 1207, 1211 (2d Cir. 1975). An injunction was held to be inappropriate relief where a concession concerning the terms of the contract would not have ended the work stoppage. *Accord*, Amstar Corp. v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972). *See* NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, 324 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974) (dissenting opinion); Comment, *Boys Markets Injunctions in Sympathy Strike Situations*, 6 LOYOLA L.J. 644, 650 (1975); Comment, *Boys Market Developments in the Third Circuit*, 48 TEMP. L.Q. 281, 309 (1975); 88 HARV. L. REV. 463, 466 (1974).

62. 368 U.S. 502 (1962).

63. "The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." *Id.* at 508-09. *Accord*, McCarroll v. Los Angeles Co. Dist. Coun. of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Dugdale Constr. Co. v. Plasterers Local 538, 257 Iowa 997, 135 N.W.2d 656 (1965); Shaw Elec. Co. v. IBEW Local 98, 418 Pa. 1, 208 A.2d 769 (1965).

64. 369 U.S. 95 (1962). The Court held that national uniformity was necessary to provide certainty to collective bargaining agreements. *Id.* at 103.

65. 353 U.S. 448, 456 (1957).

66. Comment, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1595 (1970).

67. In Dravo Corp. v. Teamsters Local 249, Civil No. 74-770 (W.D. Pa., filed September 9, 1974) the court held that although it was powerless to enjoin strike-inducers, the state court could possibly offer appropriate relief to the plaintiff employer. *Id.* at 4.

68. *See* notes 1-29 and accompanying text *supra*.

may be a conflict with state policy[69] and even though state law may designate the matter as purely procedural.[70] Federal law permits injunctive relief to issue under *Boys Markets*,[71] but only in identical factual situations. Federal law does not permit an injunction for the inducement of contract breach.[72] The situation is further confused by the failure of the Supreme Court to designate the question as substantive or procedural.

If the use of injunctions is a substantive question, then, until *Boys Markets* in 1970, state courts would have been bound by *Sinclair Refining Co. v. Atkinson*,[73] which prohibited the use of injunctions in section 301 suits in federal courts. Most state courts, however, asserted their power to enjoin breaches of bargaining agreements notwithstanding *Sinclair*.[74] This inconsistency was contrary to the Court's holding in *Lucas Flour* that there be a uniform federal labor law.[75] The Supreme Court faced the problem in *Boys*

69. Davis v. Wechsler, 263 U.S. 22, 24 (1923). "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not defeated under the name of local practice." *Accord*, Testa v. Katt, 330 U.S. 386, 393 (1947). "For the policy of the federal (Emergency Price Control) Act is the prevailing policy in every state."

70. *E.g.*, Bindczyck v. Finucane, 342 U.S. 76 (1951) (application of the Nationality Act of 1940, 8 U.S.C. § 738 (1964), regardless of state procedural rules).

71. 398 U.S. 235 (1970).

72. *See* notes 31-34 and accompanying text *supra.*

73. 370 U.S. 195 (1962). The Court held that section 301 of the LMRA was not intended to repeal the Norris-La Guardia Act's ban on federal labor injunctions.

74. *See* cases at note 34 *supra.*

75. *See* Duneau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 468 (1969); Aaron, *Labor Injunctions in the State Courts*, 50 VA. L. REV. 951, 1163 (1964). In Aaron, *Strikes in Breach of Collective Agreements*, 63 COLUM. L. REV. 1027, 1039 (1963), it was suggested that the Sinclair decision did incorporate section 4 of the Norris-La Guardia Act with its prohibition of injunctions into section 301 of the Taft-Hartley Act (the LMRA) and that state courts should, therefore, be prohibited from issuing injunctions in labor disputes.

> In so doing [the Supreme Court] would not be applying the jurisdictional limitations of the Norris-La Guardia Act to the state courts; rather it would be applying the federal common law of Section 301 [of the LMRA].

Any inconsistency between state court powers and limitations on federal courts under *Sinclair* was not meaningful as a practical matter because unions could circumvent state court jurisdiction by removal to a federal court. In Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) the Supreme Court held that removal of such an action was proper under 28 U.S.C. § 1441 (1964) because it arose under the laws of the United States. In his concurring opinion Justice Stewart recognized the dilemma created by the decision and its hamstringing effect on the state courts and predicted that the Court would reevaluate Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), which had restricted the federal courts' injunctive powers. 390 U.S. at 562.

See Comment, *Boys Market: Developments in the Third Circuit*, 48 TEMP. L.Q.

Markets.[76] The Court could have solved the dilemma by overruling *Sinclair* and allowing federal courts to issue injunctions or by extending the *Sinclair* holding to states and prohibiting them from issuing injunctions.[77] It chose the former course.[78] Although the decision attempted to resolve the state-federal jurisdictional question in favor of a uniform national labor policy, inconsistent policies still exist. Whereas, prior to *Boys Markets*, inconsistencies arose when state courts issued injunctions, since *Boys Markets* states that do not issue injunctions are out of step with federal labor policy.[79] The problem remains because *Boys Markets* skirted the central question: whether injunctive relief is substantive or procedural.[80]

The appropriate inquiry in determining whether injunctive relief is substantive or procedural is whether the remedy is important to the maintenance of a uniform federal labor policy.[81] The availability of injunctive relief is a vital concern in the administration of labor law and one which demands uniformity.[82] In order to effectuate the

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281, 291-92 (1975) and Comment, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1595-96 (1970) for a discussion of the courts' dilemma.

76. 398 U.S. 235, 244-45 (1970).

> The principal practical effect of *Avco* and *Sinclair* taken together is nothing less than to oust state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation. Union defendants can, as a matter of course, obtain removal to a federal court, and there is obviously a compelling incentive for them to do so in order to gain the advantage of the strictures upon injunctive relief which *Sinclair* imposes on federal courts.

77. *Id.* at 247.

78. The Court reversed the Ninth Circuit's ruling that a union strike in response to the employer's use of non-union employees was non-enjoinable. The union had removed the action to federal court after the employer had obtained a temporary restraining order from the California Superior Court.

79. Some states are bound by their own anti-injunction or "Little Norris-La Guardia" acts from enjoining labor disputes. *See* note 37 *supra* and note 86 *infra*.

80. The Court noted in *Boys Markets* that:

> The injunction, however, is so important a remedial device, particularly in the arbitration context, that its availability or non-availability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements.

398 U.S. at 246. The problem remains.

81. For example, the Supreme Court held in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) that the statute of limitations to be applied in section 301 suits is not so vital a problem that it demands a high degree of uniformity.

> The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it.

383 U.S. at 702. *Accord*, Butler v. Local 823, Teamsters, 514 F.2d 442, 446 (8th Cir. 1975). The court held not only that the state statute of limitations applied, but that the court could characterize the cause of action as one for a written rather than an oral contract since this longer period would best effectuate the policies underlying federal labor law of section 301. *Id.* at 447.

82. The importance of injunctive relief was discussed in Note, 46 WASH. L. REV. 805, 822-23 (1971) in which the author suggested that the question must be considered to be substantive since the availability of injunctive relief will affect the negotiation of the collective bargaining agreement. The availability of injunctions is

national labor policy, restrictions on injunctive relief in federal courts under *Boys Markets* must be applicable in state proceedings.[83]

It has been suggested that the state-federal jurisdictional dilemma be solved by applying the "outcome determinative" test to determine whether injunctions are substantive or procedural.[84] Under the test, an individual or union could not avoid federal law by bringing an action in a state with an anti-injunction statute.[85] The state court's decision would turn exclusively on the availability of the injunction remedy, and, since the availability of certain types of relief is a substantive question, federal law would apply.[86] Applicable federal law would include the *Boys Markets* restrictions on the use of injunctions. An injunction would not issue to end the inducing of a breach of a collective bargaining agreement.

V. Conclusion

Federal courts are permitted to enjoin a strike over an arbitrable grievance when the relevant contract contains a mandatory arbitration mechanism. Federal courts are powerless, however, when pickets attempt to induce a breach of a collective bargaining agreement unless the pickets violate their own contract. There is less clarity at the state level. When not preempted by the NLRB, state courts

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more likely to affect negotiations than is the application of any particular statute of limitations. *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

83. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), holding that federal law must be applied in section 301 actions, was criticized in Beckel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 10 (1957) on the ground that it would strip state courts of their traditional remedial power of injunction.

> . . . it has traditionally been settled that the law of the forum will determine whether the remedy of specific performance is available to enforce arbitration promises in any type of contract [footnote omitted]. It would be particularly startling to find this rule abrogated with respect to collective-bargaining contracts.

84. Comment, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1610-11 (1970).

85. 45 U.S.C. §§ 51-60 (1964).

86. Fifteen states prohibit the use of injunctions to end strikes in breach of no strike clauses. ARIZ. REV. STAT. ANN. § 12-1808 (1956); CONN. GEN. STAT. REV. §§ 31-112-13 (1958); HAWAII REV. LAWS § 380 (Supp. 1963); IDAHO CODE ANN. § 44-706 (1948); ILL. ANN. STAT. ch. 48, § 2a (Smith-Hurd 1950); IND. ANN. STAT. § 40-501 (1965); ME. REV. STAT. ANN. tit. 26, § 5 (1964); MD. ANN. CODE art. 100, §§ 63-75 (1957); MASS. GEN. LAWS ANN. ch. 214, § 9a (1958); N.J. REV. STAT. § 2A: 15-51-58 (1951); N.M. STAT. ANN. § 59-2-1 (1953); N.D. CENT. CODE § 34-08-01 (1959); R.I. GEN. LAWS ANN. § 28-70-2 (1968); UTAH CODE ANN. §§ 34-19-5 (1969); WYO. STAT. ANN. § 27-239 (1957). See note 36 *supra* for the states which allow injunctions to end strikes in breach of no strike clauses.

have generally retained their equitable power to enjoin unlawful picketing, limited only by the federal constitution. If the availability of injunctive relief is a substantive question, however, the granting of an injunction by a state court would be improper because state courts are required to apply federal substantive labor law. The Supreme Court has not yet designated the issue as substantive or procedural.

An employer who is subjected to stranger picketing that induces a contract breach by his employees may obtain relief for that breach in either state or federal court. The employer's only chance of court-issued injunctive relief against the pickets who induce the breach is in state court when the conduct violates the provisions or policies of state labor law. A state court may enjoin the picketing provided that (1) the prohibition is not unduly restrictive of first amendment rights, (2) jurisdiction is not preempted by the NLRB and (3) the availability of injunctive relief is considered procedural and therefore subject to state law.

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